

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

PORTS AMERICA OUTER HARBOR, LLC

and

Case 32-CA-110280

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE 190, EAST BAY
AUTOMOTIVE MACHINISTS LODGE
NO. 1546, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO/CLC**

**INTERNATIONAL LONGSHORE
AND WAREHOUSE UNION**

and

Case 32-CB-118735

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE 190, EAST BAY
AUTOMOTIVE MACHINISTS LODGE
NO. 1546, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO/CLC**

**BRIEF IN SUPPORT OF GENERAL COUNSEL'S MOTION
TO AMEND CONSOLIDATED COMPLAINT**

Pursuant to Sections 102.17 and 102.24 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel files this brief in support of the simultaneously filed Motion to Amend Consolidated Complaint. As detailed below, granting this motion to amend is just, the amendment sought is sufficiently related to existing allegations, and no undue prejudice would be visited on Respondent PAOH. See *Payless Drug Stores*, 313

NLRB 1220, 1220-1221 (1994). Furthermore, the amendment is necessary to reflect facts brought to light following the commencement of this proceeding and to establish the appropriate remedy in this case.

A. Procedural Background

The Consolidated Complaint issued in this case on December 31, 2014, and was amended prior to the opening of the record on October 5, 2015 and October 14, 2015. The hearing in this case opened before Administrative Law Judge Mary Cracraft on October 19, 2015. Prior the hearing, Counsel for the General Counsel issued, or attempted to issue, numerous subpoenas duces tecum to Respondent Ports America Outer Harbor (PAOH) and its affiliated companies “Ports America,” MTC Holdings, Inc. (MTCH) and Marine Terminals Corporation (MTC), among others, which sought information related to the relationship between Respondent PAOH and its affiliates, including but not limited to MTC, MTCH and other Ports America entities.¹

On October 13, 2015, Respondent PAOH filed a petition to revoke the General Counsel’s trial subpoena and therein urged that information related to PAOH’s corporate affiliations was not relevant to this case. On October 15, 2015, Counsel for the General Counsel filed an opposition to Respondent PAOH’s petition to revoke. On October 16, 2015, Judge Cracraft issued an Order Denying in Part and Granting in Part Respondent PAOH’s petition to revoke and ordered to Respondent PAOH to produce certain documents under the subpoena, including documents related to the relationship between Respondent PAOH and MTC/MTCH.

¹ Counsel for the General Counsel was unable to effect service of the subpoena issued to Ports America, MTCH and MTC prior to the opening of the hearing. Nevertheless, Attorney Scott Kruse filed petitions to revoke subpoenas issued to MTC and MTCH on October 15, 2015.

When the hearing opened on October 19, 2015, Respondent PAOH was unable to produce all of the subpoenaed documents, as ordered by Judge Cracraft. Counsel for the General Counsel proceeded to put on several witnesses on October 19 and 20, 2015, but the hearing was adjourned on October 20, 2015 in order to allow Respondent PAOH time to collect and present documents pursuant to the General Counsel's subpoena. (Transcript at pages 276-283).

On October 19, 2015, Counsel for the General Counsel successfully served MTC with a re-issued subpoena duces tecum. On October 26, 2015, MTC, through its counsel Scott Kruse, filed a petition to revoke the subpoena. On November 2, 2015, Judge Cracraft issued an Order Denying in Part and Granting in Part MTC's petition to revoke Counsel for the General Counsel's subpoena and ordered MTC to produce by November 9, 2015 certain documents under subpoena, including documents related to MTC/MTCH's relationship with Respondent PAOH.

On November 8, 2015, Respondent PAOH moved to amend its answer to Paragraph 10(a) of the Complaint to admit that it had constructive notice of PCMC's unfair labor practices through its corporate affiliation with MTC, which Judge Cracraft granted.

On November 10, 2015, MTC filed an amended petition to revoke Counsel for the General Counsel's subpoenas and urged that MTC's relationship to Respondent PAOH was no longer relevant in light of Respondent PAOH's amended answer. On November 12, 2015, Judge Cracraft issued a Notice to show cause why MTC's amended petition to revoke should not be granted. Following extensive briefing by MTC and Counsel for the General Counsel, on November 24, 2015, Judge Cracraft issued an Order Denying in Part and Granting in Part MTC's amended petition to revoke Counsel for the General Counsel's subpoenas and ordered MTC to

produce certain documents, including documents related to the relationship between MTC and Respondent PAOH.

The unfair labor practice trial in this matter resumed on December 8, 9 10 and 11, 2015, during which time the General Counsel called a third-party witness and two Section 611(c) witnesses: Respondent PAOH's former President, Jay Bowden, and Respondent PAOH's Director of Maintenance and Repair, Gilbert Currier. When the hearing resumed on December 8, 2015, Counsel for the General Counsel advised the parties that she intended to call the Custodian of Records of both Respondent PAOH and MTC due to concerns about missing documents and the adequacy of documents provided, particularly in light of extensive redactions and the lack of an index for the documents produced. In an agreement worked out by the parties prior to the hearing's adjournment on December 11, 2015, Counsel for the General Counsel agreed to hold off on calling the Custodians of Records for Respondent PAOH and MTC based upon the agreement of Respondent PAOH and MTC to prepare indexes of subpoenaed documents produced, and to continue working on resolving document issues prior to the resumption of the hearing on April 11, 2016. In furtherance of that agreement, on January 20, 2016, Respondent PAOH and MTC provided indexes of the documents produced to date, as well as additional documents pursuant to the General Counsel's subpoenas.

On January 19, 2016, Respondent PAOH announced its plan to close down the operation at issue in this case within 60 days. On February 1, 2016, the Region learned that Respondent PAOH had filed for bankruptcy and intended to auction its assets prior to the March 19, 2016 closure. At that time, the Region also learned that sometime in the 30 days prior to filing for

bankruptcy, Respondent PAOH changed its legal name to Outer Harbor Terminals, LLC and the bankruptcy filing was made under that name.

In light of these events and in furtherance of evidence discovered through the subpoenaed documents and witness testimony to date, Counsel for the General Counsel seeks permission to amend the Consolidated Complaint to reflect the current name of Respondent and to allege an alternate theory that Respondent PAOH is a single employer with MTCH and its affiliates, including by not limited to MTC.

B. Granting the Amendment is Just

The Board analyzes three factors in determining whether an amendment sought following the opening of a hearing is just: 1) whether there was surprise or lack of notice; 2) whether the General Counsel offered a valid excuse of its delay in moving to amend; and, 3) whether the matter has been fully litigated. See *Stagehands Referral Service*, 347 NLRB 1167 (2006); *Cab Associates*, 340 NLRB 1391, 1397 (2003). As detailed below, granting the amendment in the circumstances of this case is just under each of these factors.

1. There is no surprise or lack of notice

The relationship between Respondent PAOH and its related Ports America companies, including MTC and its parent company MTCH, has always been an issue in this case. Indeed, paragraph 10 of the Consolidated Complaint issued on December 31, 2014, specifically alleges that Respondent PAOH is a *Golden State* successor to PCMC/PMMC and was put on notice of the PCMC/PMMC litigation through its corporate affiliations with MTC/MTCH. Counsel for the General Counsel's trial subpoenas sought extensive information about the relationship between Respondent PAOH and MTC/MTCH and that issue has been the subject of thorough

pre-trial and mid-trial briefings on Respondent PAOH's and MTC's petitions to revoke those subpoenas. Counsel for the General Counsel has repeatedly taken the position in briefs and arguments at trial that the relationship between Respondent PAOH and its corporate affiliates, including MTC and MTCH, bear directly upon the equity of the *Golden State*-based remedial order sought in this case, namely that Respondent PAOH should be held liable for unfair labor practices committed by its predecessor in light of its close relationship and corporate affiliation to MTC and the fact that MTC/MTCH partially owned the predecessor, PMMC. In light of these facts, and as detailed further herein, MTC, MTCH and Respondent PAOH have been on notice of these proceedings and the fact that Counsel for the General Counsel was seeking to establish that the close relationship between these entities bears directly on the equity of the remedy sought in this case.

2. Facts supporting the amendment were brought to light following the opening of the hearing and there has been no undue delay in moving to amend;

Counsel for the General Counsel urges that this amendment is necessary to conform to the facts discovered since the opening of the hearing through the testimony of Jay Bowden in December 2015 and examination of the subpoenaed documents obtained following the opening of the hearing in this case. Counsel for the General Counsel had no way of knowing the exact nature of the relationship between Respondent PAOH and MTC/MTCH until it could review the documents, for which production is ongoing, and through the questioning of witness Bowden. In this regard, the documents provided pursuant to the subpoena demonstrate extensive involvement of MTC and MTCH in the operation of Respondent, as reflected in subpoenaed documents that have already been introduced in the trial. [GC Ex. 73 (MTCH and PAOH management services agreement; GC Ex. 74 (MTC and PAOH service level agreement); GC Exhibit 32 (MTC and

PAOH management services agreement).] The relationship between these parties was further detailed by the testimony of Respondent PAOH's former President, Jay Bowden, who testified on December 9, 10 and 11, 2015, particularly as it relates to MTC/MTCH's involvement in management of Respondent PAOH's operations, all of which was unknown to the General Counsel prior to receiving the subpoenaed documents and hearing the testimony of Mr. Bowden.

Under these circumstances, there has been no undue delay in moving to amend the complaint to reflect the true nature of the relationship between Respondent PAOH and MTC/MTCH and Counsel for the General Counsel has made this motion well in advance of the next scheduled hearing date, April 11, 2016, in order to provide ample notice and time to prepare for the hearing in the event the motion to amend is granted.

Finally, Counsel for the General Counsel has just learned of Respondent PAOH's name change and sought to amend the Consolidated Complaint as quickly as possible to reflect the current name of Respondent PAOH.

3. The matter has not been fully litigated & granting the motion would not require significant further evidence

Counsel for the General Counsel also urges that Respondent PAOH and MTC/MTCH will not be unduly prejudiced by the granting of this request as the matter has not been fully litigated and would not require significant further evidence. As noted above, Counsel for the General Counsel's trial subpoenas already addressed the relationship between Respondent PAOH and MTC/MTCH and both entities were aware of the litigation prior to initial hearing date. Moreover, Attorney Scott Kruse represents Respondent PAOH, MTC, and MTCH, as evidenced by his appearance in this matter on behalf of Respondent PAOH, and his filing of petitions to revoke the General Counsel's subpoenas on behalf of both MTC and MTCH. Thus,

neither MTC nor MTCH will be prejudiced by any lack of knowledge of the proceedings to date since their counsel has been present and participated throughout the proceedings to date.

Moreover, Respondent PAOH, MTC and MTCH will not be prejudiced by the mid-trial amendment to the Consolidated Complaint, since Counsel for the General Counsel has not rested its case in chief, has not yet called any MTC or MTCH witnesses, and Respondent PAOH has not yet presented any of its case. While Counsel for the General Counsel has called two Section 611(c) witnesses, only one of those witnesses, Jay Bowden, testified about the relationship between MTC/MTCH and Respondent PAOH.² It should be noted that Mr. Bowden is Respondent PAOH's designated party witness and he has been present for all proceedings to date and is expected to be present for the remainder of the proceedings. As such, he will be easily available for recall if any party desires to follow-up with additional questions from him in light of the requested amendment.

In addition, prior to the opening of the hearing in this matter, Counsel for the General Counsel issued subpoenas to two MTC/MTCH witnesses, Dennis Woodfork and Sean Lindsay, each of whom played some role in Respondent PAOH's labor relations. However, neither of these witnesses have testified and both are expected to testify when the hearing resumes in April 2016. Respondent PAOH and MTC/MTCH have been aware of the fact that Counsel for the General Counsel intends to call those witnesses and, if this motion is granted, all parties would have sufficient time to prepare for their testimony prior to the resumption of the trial on April 11, 2016.

² Gilbert Currier, Respondent PAOH's Director of Maintenance and Repair, testified about the continuity of work between the predecessor PMMC/PCMC and Respondent PAOH.

Finally, as noted above, Counsel for the General Counsel planned to call these witnesses and present documents related to the relationship to Respondent PAOH and MTC/MTCH, even without an allegation that they are a sing-employer. Accordingly, allowing the amendment of the Consolidated Complaint sought by this motion will not substantially lengthen the trial or delay these proceedings.

WHEREFORE, Counsel for the General Counsel prays that its Motion to Amend the Consolidated Complaint as set forth above be granted.

DATED AT Oakland, California this 10th day of February 2016.

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